

JUL 22 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)	
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Annual Assessment of the Status of)	CS Docket No. 97-141
Competition in Markets for the)	
Delivery of Video Programming)	

COMMENTS OF PRIMETIME 24 JOINT VENTURE

By

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PrimeTime 24 Joint Venture ("PrimeTime 24") hereby submits its comments in response to the Notice of Inquiry released June 6, 1997 (FCC 97-194)(the "*NOI*") in the above-captioned matter. PrimeTime 24 is a member of the Satellite Business and Communications Association (the "SBCA"), and has provided information to the SBCA for inclusion in SBCA's Comments, filed today in this proceeding. Accordingly, SBCA's responses to the specific questions posed in the NOI include information obtained from PrimeTime 24. PrimeTime 24 will, therefore, address our comments herein to our unique experience in the MVPD market as the only satellite carrier of network television programming which is not controlled or owned by cable interests.

I. Introduction.

A. Competitive Issues Presented by "White Area" Controversy.

PrimeTime 24 appreciates the opportunity to submit these comments and commends the Commission for expanding the scope of its inquiry to include specifically the question of "[t]o what extent are restrictions on the ability of satellite service providers to deliver broadcast signals to subscribers under the compulsory copyright licensing provisions of the Copyright Act influencing the ability of satellite providers to compete." The dispute over eligibility for network programming via satellite (known more widely as the "white area"

controversy) affects competition in the entire video programming market. While the Copyright Office recently held hearings on, and will soon make recommendations to the Congress concerning, the compulsory license for satellite delivery of network programming, it is, nevertheless, appropriate for the Commission to assess the impact of the Satellite Home Viewer Act (“SHVA”)¹ on competition in the video programming market.

The Commission should, in this regard, consider two issues in particular. First, the Commission has unique expertise with respect to the technical parameters of video broadcasting. Along those lines, the Commission can play a significant role in assessing the use — or misuse — of its Grade B field strength measurement, given its centrality to the dispute about the definition of unserved households under SHVA. The resolution of that dispute has broad implications for competition in the marketplace. Second, and this has enormous implications for the competitiveness of satellite versus cable, without the ability of satellite companies to deliver network programming, large numbers of consumers will have a strong disincentive to accept satellite as the primary means of viewing their programming. In the United States, network programming is viewed by consumers as an integral part of television; if satellite can’t provide the highest rated shows on television, cable will maintain that satellite is offering a seriously defective product. Therefore, the impediments placed in the way of PrimeTime 24’s delivery of network programming severely undermine the long-term ability of DirectTV, Echostar and others in the satellite industry to challenge the hegemony of cable.

¹ 17 U.S.C. §119 *et seq.*

B. PrimeTime 24.

PrimeTime 24 is the leading provider of network television programming to the direct-to-home (“DTH”) market and the only such provider not owned or controlled by cable television interests. PrimeTime 24 uplinks programming directly to consumers or through distributors of DTH satellite programming. These distributors obtain additional programming from other sources and create packages of up to 200 channels (including the network signals obtained from PrimeTime 24), transmit the broadcasts of NBC, ABC and CBS network stations pursuant to a compulsory copyright license, and pay a statutorily-determined royalty fee to retransmit network television programming to satellite subscribers in unserved households as defined by SHVA.

C. Anti-Competitive Activities of the Broadcast Interests Hurt Consumers.

PrimeTime 24's experience in bringing an affordable and popular alternative for network programming delivery to eligible home viewers is a warning to those who dare to challenge the market shares of entrenched broadcast and cable interests determined to hold on to their dominant position in the network video programming market. PrimeTime 24's success in providing digital-quality network programming at a reasonable price has resulted in the continuous and unrelenting efforts of its powerful and well-funded competitors within the broadcast television industry to put it out of business.² It is particularly ironic that the NOI in this proceeding, seeking information to assess the status of competition in the video programming market, was issued only days after PrimeTime 24 was forced to file an antitrust suit against the

² PrimeTime 24 is a defendant in three pending actions brought by broadcast television interests.

major networks (NBC, ABC, CBS, Fox) the NAB, the affiliates' associations of NBC, ABC and CBS, and certain television station licensees, to stop, among other things, the broadcast television defendants' conspiracy to squelch competition by refusing to deal with PrimeTime 24 and by colluding to drive up its litigation costs with the purpose of putting PrimeTime 24 out of business.³ While PrimeTime 24 is engaged in a fight for its very survival, the result of these illegal anti-competitive activities of the broadcast interests — if not stopped — will be felt by consumers for years to come. After all, if the broadcasters are successful in their efforts to crush PrimeTime 24, home viewers will have fewer choices for receiving network video programming.

II. The Commission's "Predicted Grade B Coverage Contour" Has Been Misappropriated and Misapplied in the Satellite Home Viewer Act.

A. The Definition Of An "Unserved Household" Is Not Workable.

For a variety of reasons — weak signals, terrain, and interference caused by buildings, bounced signals, nearby stations, power lines and other sources — many consumers cannot receive network television programming of viewable quality through the use of a conventional rooftop antenna. Satellite, on the other hand, can deliver a high-quality picture anywhere in the continental United States, and in recent years, millions of eligible consumers have chosen to receive programming via satellite.

A heated dispute between satellite providers such as PrimeTime 24 and the networks and affiliates over the meaning of the definition of an "unserved household" — under SHVA, the type of household which can legally receive network programming via satellite — threatens the delivery of network programming to the great many consumers who today have access to

³ PrimeTime 24 Joint Venture v. National Broadcasting Co., Inc., et al., 97-3951 (S.D.N.Y. filed May 30, 1997).

network programming because of satellite technology. Under SHVA, an “unserved household” is one that (among other things), “cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with the network.”⁴ (emphasis added) Unfortunately, this standard is ambiguous and, as construed by the networks, has proven to be unworkable.⁵

In 1994, broadcasters were given the right to challenge the eligibility of satellite subscribers within their service areas. Since then, more than one million households have been challenged, and due to the avalanche of challenges, a significant number of these subscribers have had their network programming service discontinued, even though they may not receive an acceptable picture.

B. Location Within A Television Station’s Predicted Grade B Coverage Contour Does Not Ensure That A Home Viewer Will Receive A Viewable Picture.

1. *The Commission never intended that “Grade B” be used to measure signal strength or to predict the quality of the picture at an individual household.* First of all, the concept of Grade B *contours* is one developed by engineers at the Commission to govern the geographic locations and coverage of television stations across the country. The Commission did not attempt to define, nor has it even addressed, the concept of a “signal of Grade B intensity”

⁴ 17 U.S.C. §119(d)(10).

⁵ PrimeTime 24 maintains that it was the intent of Congress to make satellite service available to those households which could not receive a picture of acceptable quality. “Grade B intensity,” necessarily incorporates the concept of picture quality to make sense in the entire context of the statute. PrimeTime 24 has urged Congress and the Copyright Office to clarify the standard for unserved household to make explicit its reliance on picture quality.

which a hypothetical consumer could receive using a “conventional rooftop antenna.” Neither a Grade B coverage contour nor the intensity of the signal at the contour itself were ever intended by the Commission as a predictor of picture quality in any particular household. In fact, “signal strength” received in an area has been proven not to always correlate with picture quality. Thus, SHVA’s eligibility criterion hinges on the meaning of a term, “a signal of Grade B intensity (as defined by the Federal Communications Commission),” that, while evidently used by Congress as a proxy for picture quality, has, in fact, never been defined by the Commission and was extracted from a concept which was only to be used as an area predictor. This lack of definition has, not surprisingly, created considerable uncertainty and widespread confusion over application of the statutory standard.

The Commission’s use of the predicted Grade B coverage *contour* was developed early in the development of television as predictor of service area, rather than as a predictor of the capability of individual households to receive a viewable picture. “Grade B” refers to a field strength measurement and not to a signal strength. The term is explained in the Commission’s Rules:

In the authorization of TV stations, two field strength contours are considered. These are specified as Grade A and Grade B and *indicate the approximate extent of coverage over average terrain in the absence of interference from other television stations*. Under actual conditions, the true coverage may vary *greatly* from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based.⁶ (Emphasis added.)

Section 73.683(b) qualifies the reliability of a predicted contour even further for UHF stations: “...the actual extent of service will usually be less than indicated...due to interference

⁶ Section 73.683(a) of the Commission’s Rules.

from other stations. Because of these factors, *the predicted field strength contours give no assurance of service to a specific percentage of receiver locations within the distances indicated.*" (Emphasis added.)

While the field strength measurements have been a useful tool for determining approximate coverage contours for the licensing of stations, the Commission itself has recognized the limited application of these measurements. The Commission's Rules specifically provide that the Grade A and Grade B field strength contours are to be used *only*:

- (1) In the estimation of coverage resulting from the selection of a particular transmitted site by an application for a TV station.
- (2) In connection with problems of coverage arising out of application of §73.3555 [the Commission's multiple ownership rules].
- (3) In determining compliance with §73.685(a) concerning the minimum field strength to be provided over the principal community to be served.⁷

Thus, eligibility for network programming via satellite is based on a test that the Commission explicitly states is to be used for only the most limited of purposes, none of which is to determine signal strength at a particular household. The Commission's rules specifically recognize that their standard of a signal of Grade B intensity cannot predict whether a particular household is able to view an acceptable picture with a rooftop antenna. This is consistent with the fact that signal strength was established in the field, not at individual households. Yet the broadcasters insist that this standard continue to be used in a way not even contemplated by the statute, even though they know it will mean that many consumers who cannot receive an

⁷ Section 73.683(c) of the Commission's Rules.

acceptable picture over-the-air with a rooftop antenna will be unable to receive network programming.

2. *PrimeTime 24 has urged the Copyright Office to revise the standard.*

PrimeTime 24 has urged the Copyright Office, as well as Congress, to make explicit the reliance on picture quality — rather than on receiving a “signal of Grade B intensity” — when determining which consumers are eligible to receive network programming via satellite. The actions of network affiliates make clear that they, too, understand that picture quality is SHVA’s real touchstone. Even in the limited number of instances where affiliates consider granting waivers to PrimeTime 24 customers after their challenges to these consumers’ receipt of PrimeTime 24’s programming forced PrimeTime 24 to terminate service, many affiliates make specific reference to the fact that they are allowing the consumer to continue receiving signals via satellite *because the consumer cannot receive a picture of acceptable quality*.

3. *PrimeTime 24’s Future.* PrimeTime 24 is today defending itself against lawsuits filed in three different federal courts challenging the company’s delivery of network programming to consumers. It is argued that these consumers do not live in unserved households because they can receive signals of “Grade B intensity” with the use of a conventional rooftop antenna, as determined by area measurements. PrimeTime 24 maintains, that these consumers live in “unserved households” because they cannot receive pictures of acceptable quality, using a conventional rooftop antenna.

PrimeTime 24 employs more than 25 people and spends approximately \$200,000 each month in efforts to comply with SHVA. When PrimeTime 24’s compliance efforts failed to satisfy the broadcasters, we entered into good faith negotiations fully intending to reach an

amicable settlement which would be in the best interests of consumers. The broadcasters called a halt to those negotiations less than two days before PrimeTime 24 was sued in Florida.


In spite of these setbacks, PrimeTime 24 remains committed to serving consumers unable to receive network programming over the air.

III. Conclusion.

This is, at its core, a consumer issue. Eligible consumers want to receive programming via satellite. The networks and their affiliates are suing us, however, because we threaten their overstated advertising reach and we retransmit network programming to eligible consumers via a technological means that presents real competition to the broadcasting industry.

The ability of satellite carriers to provide network programming is critical to their continued competitiveness with cable in the video marketplace. Ironically, the misuse and misapplication of the Commission's own standard, i.e. the Grade B contour, is being used by the broadcast industry to stymie the delivery of network programming by satellite and thereby blunt the satellite industry's competitive thrust.

Respectfully submitted,
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